ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 273 of the	)	CC Docket No. 96-254
Communications Act of 1934, as amended	)	
by the Telecommunications Act of 1996	)	

JOINT REPLY COMMENTS OF BELL ATLANTIC AND NYNEX

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March 26, 1997

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I. Introduction and Summary

The Telecommunications Industry Association ("TIA") and the Information Technology Industry Council ("ITI") want to rewrite the 1996 Telecommunications Act to impose more restrictions on the Bell operating companies ("BOCs") than Congress intended or than the statute allows. They also propose to require the BOCs to disclose network information that is of no use either to interconnectors or manufacturers, but will unnecessarily burden the BOCs. The Commission should deny their proposals and reject the eight pages of unnecessary, burdensome, and overly-regulatory rules that TIA asks the Commission to adopt. The Commission should also deny the request of the National Telephone Cooperative Association

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

[2] The NYNEX telephone companies ("NYNEX") are New York Telephone Company and New England Telephone and Telegraph Company.

("NTCA") to permit Section 259 qualifying carriers to obtain BOC planning information under Section 273(c)(4). The latter section applies only to "interconnecting carriers," which are not "qualifying carriers" under Section 259, and, in any case, Section 259(c) already gives qualifying carriers access to planning information relating to services provided under that section.

II. The Act Permits All Types of Close Collaboration, Research, and Royalty Agreements.

Section 273(b) of the Act makes clear that the BOCs may engage in *any* type of close collaboration with manufacturers, *any* research arrangements, and *any* royalty agreements without first obtaining interLATA relief under Section 271(d).[3] TIA, however, wants the Commission to rewrite these clear statutory provisions and adopt a totally new regulatory scheme.

First, TIA would limit permitted collaborative arrangements to those which develop "generic" specifications or involve product testing.[4] The Act, however, broadly permits the BOCs to engage in close collaboration with any manufacturer during the "*design and development*" of "hardware, software, or combinations thereof" related to equipment.[5]

Second, TIA would straight-jacket the permitted range of BOC research arrangements by limiting them to "generic" research that is not product-specific.[6] The Act,

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[3] ***See*** 47 U.S.C. § 273(b).

[4] Comments of the Telecommunications Industry Association at 12-14.

[5] 47 U.S.C. § 273(b)(1) (emphasis added).

[6] TIA at 14-18.

however, explicitly permits research that is "related to manufacturing."[7] Research that results in development of a specific product or class of products is certainly "related to manufacturing," and TIA's limitation has no statutory underpinning.

Third, TIA wants the Commission to constrain narrowly the types of royalty arrangements that the BOCs may enter into.[8] Bell Atlantic and NYNEX demonstrated in their initial comments,[9] however, that nothing in the Act or the legislative history restricts in any way the types of royalty arrangements permitted under the Act,[10] and there is no basis for the Commission to do so either.

As a number of parties point out, the language of Section 273(b) *expands* the BOCs' scope of permissible joint activities with manufacturers from those allowed under the decree or clarifies authority that may have been unclear under the decree.[11] While the Act generally adopts the decree definition of manufacturing,[12] Section 273(b) authorizes the BOCs to engage *immediately* in close collaboration, research, and royalty arrangements, activities which were either prohibited or the scope of which may have been unclear under the decree, without

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[7] 47 U.S.C. § 273(b)(2)(A).

[8] TIA at 14-18.

[9] ***See*** Joint Comments of Bell Atlantic and NYNEX at 7-8 ("Bell Atlantic/NYNEX Comments").

[10] ***See*** 47 U.S.C. § 273(b)(2)(B).

[11] ***E.g.,*** Comments of Ad Hoc Coalition of Telecommunications Manufacturing Companies, Comments of Ameritech at 14-18, BellSouth Comments at 3-8, Comments of SBC Communications, Inc. at 4-8.

[12] 47 U.S.C. § 273(h).

first obtaining interLATA relief. Accordingly, the Act explicitly permits the BOCs to engage in the very activities that TIA wants the Commission to bar, and the Commission must therefore flatly reject TIA's arguments.

Likewise, the Commission should deny the claims of TIA and ITI that any information disclosed to any manufacturer in connection with close collaboration, research arrangements, or royalty agreements must be publicly disclosed.[13] The close collaboration or research arrangements permitted under Section 273(b) generally are intended eventually to result in the design and development of capabilities to meet specific network needs.[14] Until this design and development work is completed, there is nothing to disclose that will help a manufacturer or vendor design compatible equipment. And nothing in the Act requires disclosure of network requirements for products which are still under development. Once the products are designed and interface specifications established, the BOC still needs to decide whether to buy (or make, if it has received interLATA relief) the equipment for installation in the network. If it decides to do either, it must then issue a network information disclosure, because it will have reached the make/buy decision point. If not, there will be no network change to trigger a disclosure obligation. The proposals of TIA and ITI to require the BOCs to disclose incomplete or premature information that may or may not ever relate to network changes would serve no regulatory or competitive purpose and are not required by any provision of the Act.

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[13] TIA at 25-26, Comments of the Information Technology Industry Council at 3-6.

[14] It is likely that a royalty agreement will involve the actual fabrication of a product, and that will usually occur after the make/buy decision point, so that an information disclosure will already have occurred.

III. Manufacturing Does Not Include Most Software Development.

TIA asks the Commission to adopt rules to define the types of software the Bell companies may and may not design.[15] Such an exercise is unnecessary. As the Commission noted, [16] the decree court recognized the importance of software in the telecommunications equipment marketplace and the interchangeability of hardware and a narrow category of software. It therefore ruled that the Bell companies could not design either telecommunications hardware or "software integral to [this] equipment hardware, also known as firmware."[17] Development of other types of software, that is not integral to the hardware, is not manufacturing. This decree definition has worked well for nearly a decade, and Bell Atlantic and NYNEX are aware of no decree enforcement activities or complaints that flowed from any ambiguities in this definition. There is no need for further definition now.

Moreover, what TIA is really asking for is an expansion of the decree restriction, and in a manner that makes the scope of the restriction far less clear than it is now. It urges that the Commission define the manufacturing prohibition as barring the design of software "used in conjunction with" hardware "that performs the functions of 'telecommunications equipment.'"[18] As the legislative history makes clear, however, Section 273 was enacted "to remove the

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[15] TIA at 8.

[16] Notice at ¶ 10 .

[17] ***United States v. Western Elec. Co.***, 675 F. Supp. 655, 667 n.54 (D.D.C. 1987).

[18] TIA at 9.

restrictions on manufacturing imposed by the MFJ ... and allows [the BOCs] to engage in manufacturing subject to certain safeguards."[19] Nothing in the Act or the legislative history shows that Congress authorized the Commission to expand the restrictions beyond those in the decree. Moreover, by adopting the decree definition of manufacturing,[20] with modifications and clarifications,[21] Congress exhibited its intent that even before the BOCs obtain interLATA relief, they should be subject to no greater restrictions, and some lesser ones, than in the decree.

TIA also suggests that the Commission should use this proceeding to instruct the Bell companies on how to design and operate their networks, by prohibiting them from performing operations support and network functions in the same equipment and requiring that there be standard interfaces between the two.[22] This proposal is not germane to this proceeding and should be disregarded. Moreover, TIA's proposal makes no sense. The effect of TIA's proposal would be to mandate inefficient network operations and increase costs by separating two functions that may be efficiently performed on an integrated basis. No interest would be served other than that of manufacturers that want to force the BOCs to buy two separate items of equipment.

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[19] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 152 (1996).

[20] 47 U.S.C. § 273(h).

[21] 47 U.S.C. § 273(b).

[22] TIA at 11.

IV. Key Section 273 Provisions Apply Only When a BOC Begins to Manufacture.

Contrary to the claims of TIA and ITI, Sections 273(c) (relating to information disclosure) and 273(e) (addressing procurement) apply only once a BOC actually engages in manufacturing. As several parties point out, both of these provisions are intended to ensure that the BOC does not give unreasonable preferences to its manufacturing affiliate at the expense of other manufacturers.[23] Those provisions make little sense if there is no affiliated manufacturer. In addition, the reason Congress enacted Section 273 was to establish the conditions under which the BOCs may engage in manufacturing. The very title of the section is "Manufacturing by the Bell Operating Companies." In addition, subsection (a), which introduces the entire section, specifies that a BOC may engage in manufacturing after obtaining interLATA relief "subject to the requirements of this section." TIA cannot point to anything in the language or legislative history showing any Congressional intent to impose independent requirements on BOCs that choose not to engage in manufacturing, because none exists.

V. The Act Does Not Contemplate Mandatory Licensing Of Intellectual Property.

TIA claims that any intellectual property that a BOC discloses to its affiliate must be made available to other manufacturers on the same terms and conditions.[24] As Bell Atlantic and NYNEX pointed out in their comments, mandatory licensing of intellectual property to

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[23] ***See, e.g.*** BellSouth Comments at 8-11, 25; Comments of the Pacific Telesis Group at 11-12; Comments of SBC Communications Inc. at 19, Bell Atlantic/NYNEX Comments at 9, 19.

[24] TIA at 17.

others is not required by the Act and would raise serious constitutional issues.[25] TIA's primary argument is that such licensing is needed to prevent cross-subsidies. However, the Act and the Commission's Rules already require public disclosure of all transactions between a BOC and its manufacturing affiliate,[26] mandate separate books of account that are subject to audit,[27] and subject any transactions to detailed accounting requirements.[28] Accordingly, the protections already in place are more than adequate to detect and prevent cross-subsidies.

VI. No Additional Network Disclosure Rules Are Needed.

ITI and TIA make a vague argument that the Commission's existing rules requiring public notice of network changes and disclosure of network information are inadequate to provide the information manufacturers need to develop compatible equipment.[29] The record shows, however, that the Commission's rules are very broadly-worded and encompass information needed both by interconnecting networks and manufacturers.[30] As one of the largest network equipment manufacturers urges, "the Commission [should] avoid duplicating or

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[25] Bell Atlantic/NYNEX Comments at 18-19.

[26] ***See*** 47 U.S.C. § 272(b)(5).

[27] ***See*** 47 U.S.C. §§ 272(b)(2), (d).

[28] ***See Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order***, CC Docket No. 96-150, FCC 96-490, ¶¶ 110-205 (rel. Dec. 24, 1996); 47 C.F.R. § 32.27.

[29] TIA at 18-20, ITI at 6-9.

[30] ***See, e.g.,*** Comments of US WEST, Inc. at 18-24, BellSouth Comments at 11-18, Comments of Ameritech at 19-21, Bell Atlantic/NYNEX Comments at 9-11.

reinventing protections that are already in place."[31] No party has demonstrated that the existing rules are inadequate to meet manufacturers' needs, and there is no justification for the Commission to impose new, unnecessary regulatory burdens.

VII. The Public Should Not Be Deprived of New Services When A Complaint Is Filed, Nor Should the Burden of Proof Be Shifted.

There is no valid justification for ITI's proposal to delay deployment of network changes whenever any complaint is filed about network disclosure, or to shift the burden of proof to the BOC.[32] ITI's proposal would allow one competitor to delay a BOC's offering of a new service to the detriment of the broader needs of the public in receiving innovative services and technologies. Such a proposal can never serve the public interest. It flies in the face of the Commission's own statutory mandate to "encourage the provision of new technologies and services to the public"[33] and to "encourage the deployment on a reasonable and *timely* basis of advanced telecommunications capability to all Americans."[34] The Commission should, as ITI requests, resolve complaints expeditiously. However, its proposal should be seen as providing an open invitation to file a complaint on every disclosure just to delay BOC competition and should be rejected.

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[31] Comments of Northern Telecom, Inc. at 3.

[32] ITI at 13.

[33] 47 U.S.C. § 157(a).

[34] Pub. L. No. 104-104, § 706(a) (emphasis added).

As to the burden of proof, adoption of ITI's proposal would violate Section 7(a) of the Act. That provision requires that "[a]ny person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest."[35] Any network disclosure involves the introduction of a new technology or service, and the quoted language explicitly places the burden of challenging that introduction on the opponent, not the BOC. In addition, the Commission has already found in a related context that a complainant maintains the burden of persuasion throughout a complaint proceeding, but that, once the complainant has made a ***prima facie*** case that the Commission's rules have been violated, the defendant has the burden of producing facts to refute that case.[36] That finding should apply here as well.

VIII. BOC Procurement Compliance Plans Are Unnecessary.

There is no justification for TIA's proposal to impose another layer of regulation to implement Section 273(e) relating to BOC equipment procurement. TIA would require the BOCs to file detailed compliance plans, which would be subject to public comment and Commission review, likely in a protracted proceeding.[37] The BOCs, however, have long been engaged in competitive procurement for most network equipment, even though they have been

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[35] 47 U.S.C. § 157(a).

[36] ***Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking***, CC Docket No. 96-149, FCC 96-489, ¶ 345 (rel. Dec. 24, 1996).

[37] TIA at 49-52.

prohibited from manufacturing that equipment since divestiture. Shortly after divestiture, all of the BOCs filed detailed plans with the Department of Justice showing how they planned to implement the nondiscriminatory equipment procurement requirements of the decree. In the absence of any evidence of discrimination in the 12 years since divestiture, there is no reason for the Commission to adopt TIA's overly-regulatory proposal. Instead, the Commission should rely on the complaint process to deal with any isolated cases of non-compliance.

This is just another of a long list of speculative allegations by incumbents that BOC entry into "their" business will harm competition and should be subjected to severe regulatory constraints. However, in each of the other areas in which incumbents raised similar speculative concerns, such as the provision of customer premises equipment ("CPE"),[38] information/enhanced services,[39] and cellular service,[40] the competitive marketplace has flourished after BOC entry. Other than pure speculation on the part of the incumbent manufacturers, there is no evidence that BOC manufacturing of telecommunications equipment and CPE will be any different.

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[38] ***See United States v. Western Elec. Co.***, 993 F.2d 1572, 1579 (D.C. Cir. 1993) (citing Reply Affidavit of Franklin M. Fisher at ¶¶ 53-63, ***United States v. Western Elec. Co.***, No. 82-0192 (D.D.C., dated Jan. 15, 1991)), ***cert. denied***, 510 U.S. 984 (1993).

[39] ***See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services***, CC Docket No. 95-20, Comments of Bell Atlantic, 4-15 (filed Apr. 7, 1995).

[40] ***See, e.g.,*** Second Annual Report and Analysis of Competitive Market Conditions in the Commercial Mobile Radio Services (CMRS) Industry, Federal Communications Commission (rel. Mar. 25, 1997).

IX. The Section 273(c)(4) Requirement to Release Planning Information Does Not Apply to Section 259 Qualifying Carriers.

Finally, the Commission should deny the claim of the NTCA unambiguous term, Section 273(c)(4), relating to disclosure of planning information, should be interpreted to include qualifying carriers under Section 259, the Infrastructure Sharing provision.[41] NTCA asserts that qualifying carriers should receive advance information of planned network deployment. However, Section 273(c)(4) on its face applies only to "interconnecting carriers," and carriers that qualify for infrastructure sharing under Section 259 cannot, under the terms of that section, be interconnecting carriers under Section 251.[42] NTCA's requested interpretation would therefore violate the express terms of the Act and must be rejected. Moreover, NTCA's proposal is unnecessary. Section 259(c) already gives qualifying carriers access to information on planned deployment of new services and equipment in connection with the infrastructure being shared. There is no reason why qualifying carriers need any more information than they will already receive under Section 259.

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[41] Comments of NTCA.

[42] ***See*** 47 U.S.C. § 259(b)(6).

X. Conclusion

Accordingly, the Commission should reject the proposals of TIA, ITI, and NTCA.

Respectfully Submitted,

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March 26, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 1997 a copy of the foregoing "Joint Reply Comments of Bell Atlantic and NYNEX" was served by hand on the parties on the attached list.

Tracey M. DeVaux

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